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JURISDICTIONAL STATEMENT

The subject of relators' petition for writ of mandamus was a June 22, 2004, order from the St. Louis County Circuit Court granting transfer of venue to Laclede County. Relators sought from this Court a preliminary order directing respondent to reinstate relators' claims against defendant Bette Willis in the underlying suit, and directing respondent to retransfer the underlying action to St. Louis County Circuit Court. This Court issued an alternative preliminary writ of mandamus on October 26, 2004, in response to relators' petition for writ.

This Court has jurisdiction pursuant to Article V, section 4, subsection 1 of the Constitution of 1945 of the State of Missouri, which grants this Court general superintending control over all courts and tribunals of this state, as well as the power to issue and determine original remedial writs.

STATEMENT OF FACTS

Relators Denis Tate and Dorothy Tate (hereinafter “the Tates”) are plaintiffs in a civil action styled, “Denis A. Tate and Dorothy M. Tate, Plaintiffs, v. Estate of Herbert W. Willis, by Elaine Gilley, Executor, and Bette Willis, Defendants,” Laclede County Circuit Court case number CV304-964CC. Petition, paragraph 1 (admitted by Respondent.) The case was transferred to Laclede County by the St. Louis Circuit Court by order dated June 22, 2004. Petition Exhibit 6. That order granted Defendant Bette Willis’ Motion to Dismiss and then determined that venue was “no longer available in St. Louis County.” *Id.* The case number for the action while the case was pending in St. Louis County Circuit Court was 04CC-000507. Petition Exhibits 2, 3, 4, and 6.

The civil action brought by the Tates arises out of an automobile collision which occurred on Highway 5 north of Lebanon, Missouri, on November 28, 2002. Petition, paragraph 4 (admitted by Respondent.) Mr. Herbert Willis drove the other vehicle involved in the collision. *Id.* Mr. Willis died as of result of his injuries sustained in the accident. *Id.* Bette Willis was a passenger in the vehicle driven by her husband, Herbert Willis, at the time of the collision. Petition, paragraph 5 (admitted by Respondent.)

The Tates first brought suit in Laclede County against the estate of Mr. Willis and Ms. Willis for their damages resulting from the accident. Petition, paragraph 5 (admitted by Respondent.) Relators learned through an unsuccessful return of service that Ms. Willis had become a resident of Brentwood, St. Louis County, Missouri. Petition, paragraph 7. The Tates then dismissed in Laclede County and filed in St. Louis County, Missouri, on February 4, 2004. Petition, paragraph 7 (admitted by Respondent.) Ms. Willis filed a motion to dismiss the original petition, and moved to transfer venue as well. Petition paragraphs 8 and 9 (admitted by Respondent.); Petition Exhibits 2 and 3. Respondent asserts that both motions were filed on May 3, 2004. Answer, Paragraphs 8 and 9. Exhibit A to the Answer reflects that Ms. Willis' "Motion to Dismiss" was filed on May 3, 2004. Answer Exhibit A, p. 1. Exhibit A does not reflect the date the "Motion to Transfer Venue" was filed. Answer Exhibit A. The certificates of service with Exhibits 2 and 3 demonstrate that the motions were mailed to the Tates' attorney on May 3, 2004. Petition Exhibits 2 and 3.

The other defendant in the underlying civil action, the estate of Herbert W. Willis, by Elaine Gilley, Public Administrator, was served on May 12, 2004. Answer Exhibit A, p. 2. The estate did not file a motion for transfer of venue. Answer Exhibit A.

Exhibit B to “Respondent’s Answer to Relators’ Petition for Writ of Mandamus” is a letter replying to Ms. Willis’ motion to dismiss and motion to transfer venue. Answer Exhibit B. Exhibit B, dated May 14, 2004, reflects that it was sent to the circuit court “via facsimile to (314) 615-8280.” *Id.* Exhibit A reflects that the fax letter was filed on May 14, 2004, as well. Answer Exhibit A, p. 2.

The Tates filed a “First Amended Petition” on May 18, 2004. Petition, paragraph 7; Petition Exhibit 1; Exhibit A to Respondent’s Answer to the Petition, page 2. Again, the estate of Herbert Willis filed no motion to transfer venue in response to the amended petition.

The St. Louis County Circuit Court considered “Defendant Bette Willis’ motion to dismiss plaintiffs’ first amended petition and motion to transfer” on June 2, 2004. Petition Exhibit 4. On that date, the Tates were granted to June 14, 2004, to file a memorandum in opposition to the motion to dismiss, and Ms. Willis was granted to June 21, 2004, to reply to the Tates’ memorandum. *Id.* The Tates submitted a letter dated June 14, 2004, in response to the trial court’s order (Petition Exhibit 5) and Ms. Willis submitted her reply (Answer Exhibit C). The following day, the St. Louis County Circuit Court entered its order granting Ms. Willis’ motion to

dismiss and transferring venue to Laclede County, where Respondent presides. Petition Exhibit 6.

The Tates sought a writ of mandamus from the Missouri Court of Appeals, Southern District, but were denied. Petition Exhibit 7.

POINTS RELIED ON

I.

Relators are entitled to an order requiring Respondent to reinstate relators' cause of action against Ms. Willis because the St. Louis County Circuit Court improperly granted Ms. Willis's motion to dismiss, in that: (a) relators' petition alleged facts and ultimate facts which, if proven, would support a finding of an agency relationship between Ms. Willis and her late husband in the operation of their automobile; and (b) relators were not afforded the opportunity to allege additional facts in a subsequent amended petition that would have more fully established the claim of agency, despite their request to do so, before the motion for transfer venue was granted.

State ex rel. Breckenridge v. Sweeney, 920 S.W.2d 901 (Mo.banc 1996)

State ex rel. Harvey v. Wells, 955 S.W.2d 546 (Mo.banc 1997)

Missouri Approved Civil Jury Instruction 13.06

II.

Relators are entitled to an order requiring Respondent to retransfer the underlying civil action to St. Louis County Circuit Court because the St. Louis County Circuit Court improperly granted Ms. Willis' motion to transfer venue where venue was proper in St. Louis County, in that (a) Respondent erred in granting Ms. Willis's motion to dismiss (Point I, *supra*); (b) the response to Ms. Willis's motion was not late, so the motion was not required to be automatically granted; and (c) even if the grant of Ms. Willis's motion to dismiss was proper, under the standard enunciated in *State ex rel. Doe Run Resources Corp. v. Neill*, 128 S.W.3d 502 (Mo.banc 2004), the allegations of the amended petition were sufficient for venue purposes, so that the motion to transfer venue was nonetheless improperly granted.

State ex rel. Doe Run Resources Corp. v. Neill, 128 S.W.3d 502 (Mo.banc 2004)

State ex rel. USAA Casualty Ins. v. David, 114 S.W.3d 447 (Mo.App. E.D. 2003)

Missouri Rule of Court 51.045 (2004)

III.

Relators are entitled to an order requiring Respondent to retransfer the underlying civil action to St. Louis County Circuit Court because, once the St. Louis County Circuit Court granted Ms. Willis's motion to dismiss, her motion to transfer venue was a nullity, in that she no longer had an interest in the issue of proper venue, and the only remaining party, the Estate of Herbert W. Willis, did not file a timely motion to transfer venue or timely join the motion filed by Ms. Willis, and so waived the issue of improper venue pursuant to Rule 51.045.

Phillips v. Bradshaw, 859 S.W.2d 232 (Mo.App.S.D. 1993)

State ex rel. Uptergrove v. Russell, 871 S.W.2d 27 (Mo.App.W.D. 1993)

Collins & Associates v. Labor & Industrial Relations Commission, 724 S.W.2d 243 (Mo.banc 1987)

State ex rel. Johnson v. Griffin, 945 S.W.2d 445 (Mo.banc 1997)

ARGUMENT

I.

Relators are entitled to an order requiring Respondent to reinstate relators' cause of action against Ms. Willis because the St. Louis County Circuit Court improperly granted Ms. Willis's motion to dismiss, in that: (a) relators' petition alleged facts and ultimate facts which, if proven, would support a finding of an agency relationship between Ms. Willis and her late husband in the operation of their automobile; and (b) relators were not afforded the opportunity to allege additional facts in a subsequent amended petition that would have more fully established the claim of agency, despite their request to do so, before the motion for transfer venue was granted.

“A writ of mandamus will lie only where the relator seeks to enforce a clear, unequivocal, preexisting, and specific right. *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576 (Mo.banc. 1994). The oft-repeated refrain of this Court is that the purpose of the writ of mandamus is to execute, not adjudicate. *Id.* Pretensive venue issues have been addressed by this Court through a writ of mandamus. See *State ex rel. Malone v. Mummert*, 889 S.W. 2d 822 (Mo.banc 1994); *State ex rel. Shelton v. Mummert*, 879 S.W.2d 525 (Mo.banc 1994); and *State ex rel. Cross v. Anderson*, 878 S.W.2d 32

(Mo.banc 1994).” *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 902 (Mo.banc 1996).

“Venue is pretensive if (1) the petition on its face fails to state a cause of action against the resident defendant; or (2) the petition does state a cause of action against the resident defendant, but the record, pleadings and facts presented in support of a motion asserting pretensive joinder establish that there is, in fact, no cause of action against the resident defendant and that the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against the resident defendant. The standard is an objective one, appropriately denominated as a realistic belief that under the law and the evidence a [valid] claim exists.”

State ex rel Breckenridge v. Sweeney, supra, 920 S.W.2d at 902, citing *State ex rel. Shelton v. Mummert*, 879 S.W.2d 525 (Mo.banc 1994) (which quoted *State ex rel. Toastmaster v. Mummert*, 857 S.W.2d 869, 870-871 (Mo.App. 1993) and *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 824-826 (Mo.banc 1994).

This Court has noted that “early in a lawsuit a party may not know all the facts necessary to frame his or her pleadings for trial. In such cases an allegation may be made upon a party’s reasonable ‘knowledge, information, and belief.’ Alternatively, when an allegation of general negligence is

challenged, Rule 55.27(d) provides the trial court discretion to allow a party sufficient time to discover the facts necessary to support a proper pleading. . .” *State ex rel. Harvey v. Wells*, 955 S.W.2d 546, 548 (Mo.banc 1997).

In Ms. Willis’s Motion to Transfer Venue, she alleged that, “for the reasons set forth in her motion to dismiss,” her joinder in the underlying civil action was “pretensive and solely for the basis of trying to establish venue in [the Circuit Court of St. Louis County.]” Petition Exhibit 3. In turn, Ms. Willis’s Motion to Dismiss asserted that the Tate’s petition failed to state a claim for which relief can be granted because the petition alleged only that “Defendant Bette Willis was a passenger in the vehicle operated by Herbert Willis and that she was benefiting from the operation of the motor vehicle by Herbert Willis and is accordingly vicariously liable for the alleged negligence of Herbert Willis.” Petition Exhibit 2.

Ms. Willis’s Motion to Dismiss was filed on May 3, 2004. Answer Exhibit A. The Tate’s “First Amended Petition” was filed on May 18, 2004. *Id.* Although the documents before this Court do not reflect any subsequent motion directed toward the “First Amended Petition,” or that Ms. Willis’s Motion to Dismiss was amended, the St. Louis County Circuit Court order of June 2, 2004, indicated that the court considered the motion to dismiss

with respect to the “First Amended Petition,” not the original Petition.

Petition Exhibit 4.

The sole basis for Ms. Willis’s Motion to Dismiss was that the Tates’s petition “fails to state a claim upon which relief can be granted” against her. Petition Exhibit 2, p. 2. The trial court implicitly determined the question of pretensive venue under the first test set forth in *State ex rel Breckenridge v. Sweeney, supra*, and the cases cited therein when it granted Ms. Willis’s “Motion to Dismiss” and then granted transfer of venue. Therefore, if the St. Louis Circuit Court erred in granting Ms. Willis’s motion to dismiss, it necessarily erred in granting the “Motion to Transfer Venue,” since the only ground asserted in that motion was that venue was “pretensive” because the petition “on its face fails to state a cause of action against the resident defendant.” *State ex rel. Breckenridge v. Sweeney, supra*, 920 S.W.2d at 902.

With respect to the allegations of the Tates’s first amended petition, paragraph 10 alleges that at the time of the accident, “Defendant Herbert W. Willis was operating a motor vehicle jointly owned and operated by him and his wife Bette Willis in a northbound direction on Missouri Highway 5 in Laclede County, Missouri.” The amended petition further states, in paragraph 11, that, at the time of the accident, “co-owner and Defendant

Bette Willis was a passenger in the vehicle driven by Defendant Herbert W. Willis.”

The Tates’ amended petition then alleges, in paragraph 14, that, at the time of the accident, “Defendant Bette Willis was benefiting directly or indirectly from the operation of the motor vehicle by Herbert W. Willis at that time.” The amended petition next asserts, in paragraph 15, that “at the time of the foregoing motor vehicle crash, Herbert Willis was acting as the agent, servant or employee of Defendant Bette Willis.” Finally, Paragraph 16 of the amended petition avers that “accordingly, defendant Bette Willis is vicariously liable for the above-described negligent acts of Herbert W. Willis.”

The amended petition alleged ultimate facts in support of agency. M.A.I. 13.06 defines “agency:” “Acts were within the ‘scope and course of agency’ as that phrase is used in this [these] instruction[s] if: 1. they were performed by (*name of alleged servant*) to serve the [business] [interests] of (*name of alleged master*) according to an express or implied agreement with (*name of alleged master*), and 2. (*name of alleged master*) either controlled or had the right to control the physical conduct of (*name of alleged servant*).”

The Tates’ amended petition alleged that “Defendant Bette Willis

was benefiting directly or indirectly from the operation of the motor vehicle by Herbert W. Willis at the time of the accident,” and that “Herbert W. Willis was acting as the agent, servant or employee of Defendant Bette Willis.” These ultimate fact allegations were enough for the first amended petition to have survived the motion to dismiss. At a minimum, however, The Tates should have been given the opportunity to allege additional facts in a subsequent amended petition that would more have more fully established the claim of agency before granting the motion for transfer of venue. *Breckenridge, supra*, 920 S.W.2d at 903. Certainly there are factual situations where a husband acts as an agent for his wife, and those facts could be fleshed out appropriately through discovery as set forth in *Harvey, supra*, 955 S.W.2d at 548 The St. Louis County Circuit Court did not afford the Tates that opportunity before granting the motion to transfer venue, despite the Tates’ request (Exhibit 6, page 6) but rather granted the motion to dismiss and the motion to transfer venue in the same order.

The grant of Ms. Willis’s motion to dismiss was improvident. The amended petition stated facts and ultimate facts which, if proven, would serve as a basis for a finding that Mr. Willis was Ms. Willis’s agent at the time of the collision. For the foregoing reasons, the Tates again request that Respondent be directed to reinstate their claims against Ms. Willis.

II.

Relators are entitled to an order requiring Respondent to retransfer the underlying civil action to St. Louis County Circuit Court because the St. Louis County Circuit Court improperly granted Ms. Willis's motion to transfer venue where venue was proper in St. Louis County in that (a) Respondent erred in granting Ms. Willis's motion to dismiss (Point I, *supra*); (b) the response to Ms. Willis's motion was not late, so the motion was not required to be automatically granted; and (c) even if the grant of Ms. Willis's motion to dismiss was proper, under the standard enunciated in *State ex rel. Doe Run Resources Corp. v. Neill*, 128 S.W.3d 502 (Mo.banc 2004), the allegations of the amended petition were sufficient for venue purposes, so that the motion to transfer venue was nonetheless improperly granted.

(a) *The Grant of Ms. Willis's Motion to Dismiss was Improper*

For the reasons discussed in Point I, the trial court erred in granting Ms. Willis's motion to dismiss. Therefore, since the only basis asserted in Ms. Willis's "Motion to Transfer Venue" was that basis presented in her "Motion to Dismiss," granting the "Motion to Transfer Venue" was improper. As the "Motion to Transfer Venue" indicates that "the sole basis

for venue of this action is the residence of Defendant Bette Willis in St. Louis County, Missouri,” (paragraph 4) there is nothing before this Court to demonstrate that venue was, in fact, improper if the motion to dismiss was improvidently granted. Relators are therefore entitled to an order requiring Respondent to retransfer the underlying action to St. Louis County Circuit Court, where venue was proper.

(b) Relators’ Reply to the Motion Regarding Venue was Timely

In “Respondent’s Answer to Relators’ Petition for Writ of Mandamus,” Respondent asserts that “the response to the Motion to Transfer was filed out of time and, under Rule 51.045, the Motion to Transfer, thus, had to be sustained.” Page 4, Respondent’s Answer. Further, Respondent asserts that “The Motion to Transfer was filed May 3, 2004. . . . Relators’ Response to the Motion to Transfer was not filed until May 24, 2004.” Paragraph 10, Respondent’s Answer.

The minutes attached to Respondent’s Answer do not reflect the filing of the “Motion to Transfer.” Answer, Exhibit A. The motion’s “Certificate of Service” indicates it was “mailed, first class, postage prepaid, this 3 day of May, 2004. . .” Petition, Exhibit 3.

Relators’ letter in response to the Motion to Transfer was faxed to the trial court on May 14, 2004. Answer, Exhibit B. The trial court’s minutes

do reflect the receipt of a “fax letter from Robert Curran” that was “filed” on May 14, 2004. Answer, Exhibit A. Respondent apparently overlooks the fax filing of the reply to the motion to transfer venue, and relies upon the filing date of the hard copy of the letter sent by mail in asserting that the response was not filed until May 24, 2004.

“[W]here a party is required to take some action in response to a motion within a prescribed period of time, as in the present case, the party is allowed three additional days to do so where the motion is served by mail.” *State ex rel. USAA Casualty Ins. v. David*, 114 S.W.3d 447, 448 (Mo.App.E.D. 2003). *State ex rel. USAA Casualty Ins. v. David* involved a response to a motion to transfer venue pursuant to Rule 51.045, just as does the instant case.

By Rule 51.045 and *State ex rel. USAA Casualty Ins. v. David, supra*, then, Relators’ response was due by May 17, 2004, a Monday. The court’s records indicate the response was received on May 14, 2004. Relators’ response was therefore timely, and the trial court was not required to grant the motion automatically, as asserted by Respondent.

(c) *Relators’ Petition Survives the Applicable Test for Venue*

Relators further submit that, even if Relators’ Petition is not sufficient to survive the motion to dismiss for failure to state a claim, Ms. Willis’s “Motion to Transfer Venue” was nonetheless improperly granted.

There is no indication that Respondent examined Relators’ Petition under the appropriate standard when determining whether to grant the motion for transfer for improper venue: “The standard for determining if a petition states a claim against a defendant for venue purposes is whether, after reasonable legal inquiry under the circumstances, the plaintiffs state a claim under existing law or under a non-frivolous argument for the extension, modification or reversal of existing law, or under a non-frivolous argument for the establishment of new law. . . . Although this standard is less stringent than for granting a motion for summary judgment or sustaining a motion to dismiss on the merits, the petition still must be ‘liberally construed’ in favor of the plaintiff. . . .” *State ex rel. Doe Run Res. v. Neill*, 128 S.W.3d 502, 505 (Mo.banc 2004) (cites omitted.)

Nothing in the record before this Court demonstrates that the trial court examined Relators’ First Amended Petition pursuant to this standard. The only fair reading of the trial court’s “Order/Judgment” filed June 22,

2004, is that the trial court granted Ms. Willis's "Motion to Dismiss," and then, on that basis and without further inquiry, determined that, "as venue is no longer available in St. Louis County, Defendant Bette Willis' Motion to Transfer Venue is sustained." It does not appear that the trial court ever examined the "First Amended Petition" in light of the test set forth in *State ex rel. Doe Run Res. v. Neill, supra*, 128 S.W.3d at 502. Implicit in the test set forth in *State ex rel. Doe Run* is that the sufficiency of the first amended petition be measured by that test, and a determination made that the petition does not survive that test, before granting a motion to transfer venue.

Relators respectfully submit that, when examined by the "less stringent" standard set forth in *State ex rel. Doe Run Res. v. Neill, supra*, their first amended petition stated a claim against defendant Willis *for venue purposes*, regardless of the trial court's ruling on Ms. Willis's motion to dismiss. Therefore, the grant of the motion to transfer venue was improper for the foregoing reasons.

III.

Relators are entitled to an order requiring Respondent to retransfer the underlying civil action to St. Louis County Circuit Court because, once the St. Louis County Circuit Court granted Ms. Willis's motion to dismiss, her motion to transfer venue was a nullity, in that she no longer had an interest in the issue of proper venue, and the only remaining party, the Estate of Herbert W. Willis, did not file a timely motion to transfer venue or timely join the motion filed by Ms. Willis, and so waived the issue of improper venue pursuant to Rule 51.045.

The trial court granted Ms. Willis's motion to dismiss for failure to state a claim upon which relief can be granted. If this court concludes that the motion to dismiss was properly granted, the Tates respectfully submit that the motion to transfer for improper venue was nonetheless improperly granted.

“A pleading which states no cause of action confers no subject matter jurisdiction on a court and is subject to dismissal. *Sisco v. James*, 820 S.W.2d 348, 351[4] ((Mo.App.S.D. 1991); *Wright v. Mullen*, 659 S.W.2d 261, 263[4] (Mo.App.W.D. 1983). The only power a court without subject matter jurisdiction possesses is the power to dismiss the action. Rule 55.27(g)(3); *Sisco*, 820 S.W.2d at 351[4]; *Wells v. Nolden*, 679 S.W.2d 889,

891[7] (Mo.App.E.D. 1984); *Gaslight Real Estate Corp. v. Labor and Industrial Relations Commission*, 604 S.W.2d 818, 820[4] (Mo.App.W.D. 1980).” *Phillips v. Bradshaw*, 859 S.W.2d 232, 234 (Mo.App.S.D. 1993).

“The established legal theory is that when venue is not proper in the court in which the case is filed, service of process is defective and the court has no jurisdiction over the party and thus no power to hear the case. *See, State ex rel. Boll v. Weinstein*, 365 Mo. 1179, 295 S.W. 2d 62, 66 (Mo.banc 1956). However, because proper venue is a personal privilege, objection to venue may be waived. *Norman v. Norman*, 604 S.W.2d 680, 681 (Mo.App. 1980).” *State ex rel. Uptergrove v. Russell*, 871 S.W.2d 27, 29 (Mo.App.W.D. 1993).

“Where a court has no subject matter jurisdiction, its proceedings are absolutely void. *E.g., Randles v. Schaffner*, 485 S.W.2d 1, 2 (Mo. 1972). The only recourse of a court which lacks subject matter jurisdiction of a cause is dismissal of the cause. *Gaslight Real Estate Corp. [v. Labor & Industrial Relations Comm’n]*, 604 S.W.2d 818, 820 (Mo.App. 1980)] . . .” *Collins & Associates v. Labor & Industrial Relations Commission*, 724 S.W.2d 243, 245 (Mo.banc 1987).

“When venue is waived, a court does not have jurisdiction to transfer a case on the basis of ‘improper venue.’ *State ex rel. Brockfield v.*

Pravaznik, 812 S.W.2d 568, 568 (Mo.App. 1991); *State ex rel. Bohannon v. Adolf*, 724 S.W.2d 248, 249 (Mo.App. 1987).” *State ex rel. Johnson v. Griffin*, 945 S.W.2d 445, 446 (Mo.banc 1997).

At the time Ms. Willis’s “Motion to Transfer Venue” was ruled, Rule 51.045 provided that, if a motion to transfer venue is not timely filed, the issue of improper venue is waived. Rule 51.045(a) (2004). To be timely, the motion to transfer venue was required to have been filed within the time allowed for responding to an adverse party’s pleading where, as in this case, a responsive pleading is permitted. Rule 51.045(a)(1).

Relators submit that because the trial court determined that Relators’ Petition failed to state a claim for which relief could be granted as against Ms. Willis, there was no jurisdiction to consider her motion to transfer venue. The remaining defendant, the Estate of Herbert W. Willis, never filed a motion to transfer venue pursuant to Rule 51.045, and there is no indication in the record that the estate joined in Ms. Willis’s motion prior to the trial court’s ruling on the motion to dismiss.

As a result, the ruling on Ms. Willis’s motion to transfer venue should be a nullity since the motion to dismiss had already been granted. Ms. Willis no longer had an interest in venue once her motion to dismiss had been granted. Further, since the estate, the only remaining defendant, filed

no motion within the time provided by Rule 51.045, it waived the issue of venue by the terms of said Rule. Therefore, Relators are entitled to an order requiring Respondent to retransfer the underlying action to St. Louis County Circuit Court.

CONCLUSION

For all of the foregoing reasons, Relators pray that Respondent be ordered to reinstate Relators' cause of action against Defendant Willis, that Respondent be directed to retransfer the underlying cause to St. Louis County Circuit Court, where venue properly lies, and for such other and further relief as this Court deems just.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing instrument was served upon all attorneys of record by depositing same in the United States Mail, first class, postage prepaid, addressed to the following:

Mr. Jon R. Sanner and Mr. Jeffrey J Brinker;
The Honorable James Franklin; and
Mr. Monte Clithero.

This 11th day of January, 2005.

Craig A. Smith

CERTIFICATE OF VIRUS-FREE DISK

I, the undersigned, hereby certify pursuant to Rule 84.06 (g) that the accompanying floppy disk has been scanned for viruses using Norton AntiVirus version 11.0.2.4 this 10th day of January, 2005, and the software reports that the floppy disk is virus-free.

Craig A. Smith

RULE 84.06(c) CERTIFICATION

I, the undersigned, hereby certify that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that a word count performed in Micosoft Word 2003 indicates a total word count of 4771.

Craig A. Smith